NOTES

The Theory of the Tentative Trust

The foundation of the tentative trust is a deposit of funds by A "in trust for B". It was not new when the New York Court enunciated the tentative trust doctrine.[1] Such deposits "in trust", however, caused much difficulty because of the uncertainty as to whether the depositor on making the deposit in this form intended to make a gift of the money or had no intention at all of divesting himself of ownership.[2] If that doubt were resolved in favor of the "in trust" deposit being a genuine trust disposition, further confusion resulted by virtue of the fact that such a trust was considered "irrevocable" in spite of the prevalent practice of the depositor to use it as his own until his demise.[3] Since originally, then, a transaction such as this was accorded the status of an immediate legal trust,[4] the estate of the depositor would be liable for any withdrawals after its creation. Because of these factors, the New York law was in a rather confused state. Nevertheless, the dominant purpose behind this form of deposit was recognized—that is, "to avoid the trouble of making a will";[5] the practice was prevalent, and because it was a convenient method of disposing of small sums with little chance of fraud,[6] the New York court was disposed to reconcile the existing decisions and approve the practice. In doing so its problem was to prevent the estate from being surcharged for subsequent withdrawals made by the depositor during his lifetime, but still to consider the arrangement as a trust in order to effectuate the genuine dispositive intent of the depositor, i. e., to cause the balance of the deposit to go to the named beneficiary upon the depositor's death. To accomplish these purposes the court evolved the doctrine of the "tentative trust" from out of the jumble of its former decisions. The language it chose to use is the now famous and oft-quoted paragraph of *Matter of Totten:*[7]

> "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."[8]

Since the "Totten trust" was evolved from the strict legal trust, a mere departure for convenience, the court "guided by the principles established by our former decisions"[9] announced the rule that it should be

1. 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES (1935) § 47; Matter of Weinberg, 162 Misc. 867, 296 N. Y. Supp. 7 (Surr. Ct. 1937).
2. Beaver v. Beaver, 117 N. Y. 421, 430, 431, 22 N. E. 940, 942 (1889).
3. Note (1933) 8 TEMP. L. Q. 90.
4. Martin v. Funk, 75 N. Y. 134 (1878).
5. Matter of Totten, 179 N. Y. 112, 124, 71 N. E. 748, 752 (1904).
6. Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 542.
7. 179 N. Y. 112, 71 N. E. 748 (1904).
8. *Id.* at 125, 71 N. E. at 752.
9. *Ibid.*

expressed in terms of the concept from which it grew, modified to obtain the desired result. However natural the reason, the use of such language as "tentative", "trust" and "irrevocable" has been regarded as unfortunate by Professor Bogert.[10] It gives rise to speculation, never intended, as to the theory of the tentative trust. That is to say, since it is labeled a "trust", though tentative and revocable, is it to have all the incidents, not expressly excluded by the statement of the rule itself, of the ordinary common law trust? Or, is it *sui generis,* no more than an attempt to solve a particular problem by the use of familiar language with no intent that the entire connotation of the phrases used is to follow?

The problem immediately arises as to the moment of the creation of this legal relationship termed a tentative trust. To those who contend that the relationship created is essentially a trust, the time of its inception must perforce be the moment the deposit is made or the moment of the last deposit or withdrawal, for they are the only instances at which the depositor evinces any intent upon which a trust can be based.[11] There is authority to the effect that this is the doctrine of the tentative trust as laid down by the New York courts—that a trust is created at the time of the deposit, establishing rights in the named beneficiary subject to a power of revocation.[12] On the other side there are those who consider the tentative trust to be *sui generis,* a mere fiction to obtain a desirable result, and they would stringently limit the trust analogy. Naturally, to them the fiction is not to be indulged in until necessary, i. e., until the death of the depositor. They suggest that no trust is created until then, that no change of legal status is effected by making the deposit "in trust for" during the life of the depositor.[13] Under this tentative trust theory "the beneficiary's rights remain inchoate, until the depositor dies without having disturbed the declaration."[14] Succinctly stated, the conflict is as to whether the "trust" is initiated at the time of the deposit and is subject to a condition subsequent of revocation or whether the depositor's death is a condition precedent to its creation.[15]

Since New York is the home of the tentative trust, and the source of most of the litigation concerning it, a review of the cases there decided is probably the best approach to uncover the theory behind the concept. In the main, the New York cases in spite of their profusion consist of reiterations of the basic principles of the tentative trust and most are content to cite or quote the *Totten* case for this purpose.[16] Some seek to clarify this

10. Bogert, *The Creation of Trusts by Means of Bank Deposits* (1916) 1 CORN. L. Q. 159, 171, n. 86. See also Note (1919) 4 MINN. L. REV. 56, 61.

11. Matter of Weinberg, 162 Misc. 867, 872, 296 N. Y. Supp. 7, 15 (Surr. Ct. 1937); *In re* Mines, 31 Pa. D. & C. 153, 157 (1937).

12. Scott, *loc. cit. supra* note 6. It should be noted that the *Totten* language says "created", but does not indicate when.

13. Bogert, *loc. cit. supra* note 10; Slater, *Joint Accounts and Trusts Created by Bank Deposits* (1933) 2 BROOKLYN L. REV. 27, 36; Notes (1934) 39 DICK. L. REV. 37, 38, (1919) 4 MINN. L. REV. 56, 59, 61, (1928) 37 YALE L. J. 1133, 1137.

14. Note (1934) 39 DICK. L. REV. 37, 40.

15. Scott, *supra* note 6, at 543.

16. For instance: Matter of Slobiansky, 152 Misc. 232, 273 N. Y. Supp. 869 (Surr. Ct. 1934) (beneficiary cannot recover withdrawn sums); Tierney v. Fitzpatrick, 122 App. Div. 623, 107 N. Y. Supp. 527 (1st Dep't, 1907); Matthews v. Brooklyn Savings Bank, 208 N. Y. 508, 102 N. E. 520 (1913) (the trust is revocable by the depositor); Thomas v. Newburgh Savings Bank, 73 Misc. 308, 130 N. Y. Supp. 810 (1911) (the deposit may be disposed of by will); Davlin v. Little Guarantee and Trust Co., 229 App. Div. 269, 241 N. Y. Supp. 712 (1st Dep't, 1930) (the trust may be made irrevocable); Matter of Vaughan, 145 Misc. 332, 260 N. Y. Supp. 197 (Surr. Ct. 1932) (sufficiency of the evidence of revocation). This last case also states that the "unequivocal act or declaration" necessary to make the trust irrevocable gives rise to substantially all of the litigation on Totten Trusts. *Id.* at 335, 260 N. Y. Supp. at 201.

broad statement of principle with explanatory phrases of their own. And the idea then conveyed is that the tentative trust is not a completed *inter vivos* transaction subject to destruction at the will of the depositor, but is an incipient relationship only, suggested or proposed, which is not completed or consummated until the death of the depositor.[17] However, both the cases which merely cite the *Totten* case and those which seek further to expound the language of that case are not very useful on the theoretical aspect. In all of these cases the dissention occurred between the beneficiary and the depositor's estate after the latter's death, the problem being either what was the depositor's intention as to the "in trust" deposit or whether an admittedly tentative trust account had been revoked. And in these situations an acceptance of either the completed *inter vivos* theory or the mere inchoate relationship theory of the tentative trust would have produced the desired result of getting the proceeds to the beneficiary. Consequently, no matter how pertinent the language seems, its force is dissipated when the situation in which it is uttered is considered.

However, there are, fortunately for the theorist, cases where the language used is reflected in and necessary to the final disposition of the case. In some of these, too, the ultimate issue is the same as in the first-considered cases—that is, whether the beneficiary or the estate takes; but the factual situation enhances their value here. In *Matter of United States Trust Company*,[18] a case arising soon after the *Totten* case, the issue as to the time of the creation of the trust was the focal point of the decision. The beneficiary had predeceased his father, the depositor, who after the former's death did nothing about the account. Upon the father's death the son's widow claimed the account. Her claim was denied, the court saying: "It will be seen upon a careful reading (of the *Totten* case) that the trust is, in the first place, described as a 'tentative trust', by which we understand a suggested or proposed trust, not completed or consummated. . . . It would seem to follow that until the depositor's death the funds on deposit are impressed with no trust in the sense that any title thereto, actual or beneficial, rests in the proposed beneficiary unless the depositor shall have completed the gift. . . . As to him the tentative trust remains inchoate and incomplete."[19] Further, ". . . upon the death of the proposed beneficiary before the depositor the tentative trust terminated *ipso facto*, . . . and . . . no action was necessary on the part of the depositor to terminate the trust."[20] The dissent[21] was based on the ground that the deposit created a valid trust, though revocable, which remains such until revoked by the depositor. Absent any revocation the validly created trust continues, as in the case of any other revocable trust, until defeated by the depositor.

What was established here remains today an undisputed incident of the tentative trust. That is, the predeceasing of the beneficiary defeats the trust even without action by the depositor. Yet such a result could only have been achieved as the majority reasoned it—by considering the "in trust" deposit as creating a purely inchoate relationship held in abeyance, so far as the beneficiary is concerned, to the same extent as a devise under a will, until the depositor's death.

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17. Tibbits v. Zink, 231 App. Div. 339, 341, 247 N. Y. Supp. 300, 303 (3d Dep't, 1931) (concerning evidence of revocability).

18. 117 App. Div. 178, 102 N. Y. Supp. 271 (1st Dep't, 1907).

19. *Id.* at 180, 102 N. Y. Supp. at 272.

20. *Id.* at 181, 102 N. Y. Supp. at 273.

21. *Id.* at 182, 102 N. Y. Supp. at 273.

A corollary of the above proposition, and substantiating it, is the accepted principle that the beneficiary of a Totten trust has no interest until the depositor's death.[22] Were there here a validly created trust, though revocable, this conclusion could not follow for the *cestui* of an ordinary trust not only has an interest but may alienate it despite its contingent nature or its defeasibility.[23]

The first cases to be considered are those which concern a creditor's right to reach the proceeds of the tentative trust when the depositor's estate was insufficient. This right was early upheld in *Beakes Dairy Co. v. Berns.*[24] Concerning that case, it has been said by a recent decision involving the same facts that it was a "directly pertinent pronouncement . . . determining that so far as creditors of the depositor are concerned the effective moment of the devolution is that of his death." [25] The *Beakes* case holds that since the depositor had control of the funds during his lifetime and could have satisfied the claims, the transfer at death which completes the gift and creates the trust is considered a fraud on the creditor which can be set aside.[26] Yet, if the trust were a completed *inter vivos* transaction, setting it aside on the grounds of fraud could only be possible if the intent to defraud were present when the deposit was made.[27] Situations involving actual fraud at that time do occur.[28] However, there is no suggestion in the cases that the rights of creditors are so limited. Yet it would be difficult to impose the constructive fraudulent intent as to debts contracted years after the creation of the "trust" especially if the depositor were at the time of depositing entirely solvent. The attitude of the *Beakes* case on the theory of the tentative trust is made the more unmistakable and authoritative when it is seen that it was not necessary to adopt this rationale to secure the payment of the creditors. That could have been accomplished, as it was to funeral and administrative expenses after the depositor's death,[29] by considering the presumption of an absolute trust as to the balance remaining on deposit to be rebutted to the extent necessary to pay such creditors.

To like effect are the early holdings on the question whether the transmission of the avails of a tentative trust is in effect a testamentary act in derogation of the rights of the surviving spouse to take against the estate. Here the issue regains the aspect of a controversy between the beneficiary and the estate, for a wife wishing to take against the beneficiary must first establish the estate's right to the deposit. But for the first time in this type case the difference in theory is claimed by the parties to require different results, i. e., if *inter vivos* the estate prevails, if arising at death the wife prevails for it is a testamentary transfer in derogation of her rights. The matter was first presented collaterally in *Matter of Clark's Estate.*[30] If the wife took the proceeds under the Decedents' Estates Law [31]

22. Matter of Kelly, 151 Misc. 277, 271 N. Y. Supp. 457 (Surr. Ct. 1934); see Matter of Vaughan, 145 Misc. 332, 260 N. Y. Supp. 197 (Surr. Ct. 1932).

23. 1 BOGERT, *op. cit. supra* note 1, § 188.

24. 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't, 1908).

25. Matter of Weinberg, 162 Misc. 867, 873, 296 N. Y. Supp. 7, 16 (Surr. Ct. 1937).

26. Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't, 1908). See also *In re* Reich's Estate, 146 Misc. 616, 262 N. Y. Supp. 623 (Surr. Ct. 1933).

27. As to setting aside trust in general for fraud, see RESTATEMENT, TRUSTS (1935) § 63.

28. Matter of Weinberg, 162 Misc. 867, 296 N. Y. Supp. 7 (Surr. Ct. 1937).

29. *In re* Reich's Estate, 146 Misc. 616, 620, 262 N. Y. Supp. 623, 627 (Surr. Ct. 1933); RESTATEMENT, TRUSTS § 58, comment *c*.

30. 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933).

31. 13 N. Y. CONSOL. LAWS (McKinney, Supp. 1938) § 18.

they were not taxable, being less than the exemption sum. If the beneficiary took, the proceeds of the deposit are taxable. The court sustained the tax, holding that the provisions of the Decedents' Estates Law had no applicability to the tentative trust as the proceeds of the "trust" were not part of the decedent's estate which would have passed by intestacy and against which the wife could take. The court recognized, as the wife contended, that the trust arose at the moment of death, and that it was death which effectuated the transfer, but it held despite that fact that the Totten trust formed no more a part of the decedent's estate than the subject matter of a joint tenancy with survivorship wherein the interest of the survivor in the whole of the property ripens at the death of one of the joint tenants.[32] Recently a case has been decided by a Special Term of the New York Supreme Court allowing the wife to take against the "trust" deposit because of its "testamentary" nature.[33]

The final category to be considered are the tax cases. They are interesting insofar as they do not represent any departure from the theory that the trust does not spring into being until death. On the basis of the depositor's right to control, the interests granted the beneficiary were considered as only intended to take effect in possession and enjoyment at or after death in *In re Barbey's Estate*.[34] Such interests were held to be identical with those passing by will. The transfers are within the purpose and express language of the decedent estate statute and they are taxable.[35] However, since the New York view as to ordinary revocable trusts is, that as far as taxation purposes is concerned, they too are transfers taking effect at death,[36] the acceptance of the *inter vivos* revocable trust theory of the tentative trust would have produced the same result.

However that may be, this resume of the New York cases demonstrates that the tentative trust is considered to be testamentary in character, which means that the moment of its creation is the moment of the depositor's demise. That is true despite Professor Scott's comment that the tentative trust should be considered testamentary in nature even if it is thought to be a completed *inter vivos* revocable trust from the moment of deposit.[37] It is true that for the purposes of some statutes any revocable trust would be considered testamentary, i. e., the New York inheritance tax statute and the Decedents' Estates Law. But that result is not universal even under such statutes.[38] In addition we have seen situations not under statutes where the *inter vivos* theory is inapplicable. Both of these factors would seem to weaken the assertion that the tentative trust should be considered testamentary in nature even though it be a completed *inter vivos*

32. Matter of Schurer's Estate, 157 Misc. 573, 248 N. Y. Supp. 28 (Surr. Ct. 1935), *aff'd*, 248 App. Div. 697, 289 N. Y. Supp. 818 (1st Dep't, 1936); Matter of Clark's Estate, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933); Matter of Yarme's Estate, 148 Misc. 457, 266 N. Y. Supp. 93 (Surr. Ct. 1933), *aff'd*, 242 App. Div. 693, 273 N. Y. Supp. 403 (2d Dep't, 1934).

33. Murray v. Brooklyn Savings Bank, 9 N. Y. S. (2d) 227 (Sup. Ct. 1939).

34. 114 N. Y. Supp. 725 (Surr. Ct. 1908).

35. *Ibid.* See also: Matter of Halligan, 82 Misc. 30, 143 N. Y. Supp. 676 (Surr. Ct. 1913); Matter of Bender, 182 N. Y. Supp. 217 (Surr. Ct. 1915); Matter of Kiernan, 134 Misc. 868, 237 N. Y. Supp. 290 (Surr. Ct. 1929); Matter of Clark's Estate, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933).

36. Matter of Bostwick, 160 N. Y. 489, 55 N. E. 208 (1899), with which compare *In re* Pierce's Estate, 132 App. Div. 465, 116 N. Y. Supp. 816 (4th Dep't, 1909). For the latest view see 59 N. Y. CONSOL. LAWS (McKinney, 1937) § 249-r, subdiv. 4, and Matter of Brown, 153 Misc. 70, 274 N. Y. Supp. 463 (Surr. Ct. 1934).

37. Scott, *loc. cit. supra* note 15.

38. See *In re* Dolan's Estate, 279 Pa. 582, 124 Atl. 176 (1924).

relationship.[39] At any rate, whether the creation at the moment of death theory of the tentative trust be correct or not, the least that can be said is that the New York courts refuse to apply stringent trust concepts to settle problems arising before the depositor's death. In view of the reason for the tentative trust—to secure the passage of the remainder of the deposit to the beneficiary without the making of a will—this is a sensible approach.

Turning to authorities outside New York, one finds that when the American Law Institute adopted a tentative trust section for its *Restatement of Trusts*[40] the important black-letter passage attempted a mere rephrasing of the exact rule of the *Totten* case. The subsequent additions to the doctrine, such as holding the predeceasing of the beneficiary defeats the trust and upholding a creditor's rights to reach the proceeds, were dealt with in the comments. There are two things appearing in the section which are possible intimations of the theory behind the tentative trust concept. The first is the use of the word "trust" in the black-letter passage to refer to the tentative trust concept. That, however, is at the very least rendered ambiguous authority by the concurrent use of "intended trust" in the same passage. The second suggestion is the adoption in comment *b* of the principle that the predeceasing of the beneficiary defeats the trust. If the rationalization of such an addition to the main doctrine as hereinbefore attempted is the single possible one, then it is inferable here that the *Restatement* adopts the theory that a tentative trust is an inchoate, incomplete relationship until the depositor's death. But such is only an inference, and the question as far as the language of the section goes remains unsettled.

There were, however, two jurisdictions in addition to New York which were considered as having accepted the tentative trust doctrine when the adoption of the section was contemplated. These were Minnesota and Maryland. The Minnesota case of *Walso v. Latterner*[41] contains no enlightenment as to any theoretical concept. It appears merely to adopt the New York view that a deposit "in trust for" is sufficient evidence of the depositor's intent to make a gift, rather than accepting the Massachusetts view that such a deposit, coupled with retention of the pass-book, is not.[42] But the court seems not at all clear as to what a tentative trust is, it having considered the depositor's withdrawals unimportant to the decision. Nevertheless, subsequently in Minnesota it has been interpreted as introducing the doctrine of the tentative trust there in *Coughlin v. Farmers & Mechanics Savings Bank*.[43] This latest Minnesota case cites the *Walso* case, and a decision which relied solely upon it,[44] as settling the issue whether "these trusts were testamentary in character and did not become effective in his lifetime."[45] It said: "Trusts of the kind here involved have been held valid as express trusts under our statutes and to vest title to funds depos-

39. The RESTATEMENT § 57 (3) states that except for the tentative trust, if a settlor reserves the right to deal with the property as he likes as long as he lives, the trust is testamentary. This would seem to mean that the factor of control should have no significance in determining the testamentary nature of the tentative trust.

40. RESTATEMENT, TRUSTS § 58.

41. 140 Minn. 455, 168 N. W. 353 (1918), 143 Minn. 364, 173 N. W. 711 (1919).

42. Brabook v. Savings Bank, 104 Mass. 228 (1870). See BOGERT, *loc. cit. supra* note 1.

43. 199 Minn. 102, 272 N. W. 166 (1937).

44. Dyste v. Farmers & Mechanics Savings Bank, 179 Minn. 430, 229 N. W. 865 (1930).

45. Coughlin v. Farmers & Mechanics Savings Bank, 199 Minn. 102, 104, 272 N. W. 166, 167 (1937).

ited in the donee or donees unless disaffirmed by the depositor before his death, or set aside for fraud or incompetency." [46] Thus, with some hesitancy, Minnesota can be said to propound a theory different from the state of the tentative trust's origin.

The Maryland cases present a slight improvement as to clarity, the latest contribution before the *Restatement* speaking in terms of a "gift" and conveying the impression of a completed relationship, subject to revocation, upon the making of the deposit.[47] Thus, with a possible split in theory existing among the authorities on which it relied, plus the reporter's conviction that the New York concept is that a trust is created at the moment of deposit,[48] it is evident that the *Restatement* is not authoritative on the question of theory.

Since the tentative draft of the *Restatement* was promulgated, two jurisdictions are considered as having adopted the tentative trust idea. They are Pennsylvania, where it has undoubtedly been accepted, and California, where its status is in doubt. In California, *Kuck v. Raftery* [49] is the leading case. The significance of its holding even the California courts dispute.[50] In it there was established a deposit "in trust for" and the beneficiary signed the deposit card. There were no withdrawals. The administrator of the estate sought to recover the fund, attacking the deposit as an invalid trust because the depositor retained the power of withdrawal. The court rejected this contention on the authority of cases wherein the creation of a joint account by a depositor payable to himself and to others creates a trust for the others, though the power to revoke by withdrawal remained. The court felt that conceding the possibility of the creation of a revocable trust, it could decide the case on the basis of either the New York view of tentative trusts or the Massachusetts view which recognizes only irrevocable trusts in savings accounts, because there was ample evidence of the intent of the depositor, in addition to the mere form of the account, to satisfy the Massachusetts view in this regard. Therefore, if the Totten rule is recognized in California,[51] its basic concept would seem to be that of an immediate interest being created at the time of the deposit. The analogous situation upon which the court relied to establish the essential element of revocability by withdrawal, i. e., that of revocable trusts in joint accounts, is a completed trust relationship at the moment of deposit.[52] Furthermore, since the Massachusetts view of savings bank accounts "in trust for" is a very definite concept of an irrevocable, completed trust, there is little room to doubt that the California court likened the New York idea to this rather than vice versa, especially when, as we have seen, there is dispute as to what the New York view is.

A saving feature of the cases in these jurisdictions accepting the tentative trust is that they present, as did most of the New York cases, the

46. *Ibid.*

47. Sturgis v. Citizens National Bank of Pocomoke City, 152 Md. 654, 137 Atl. 378 (1927).

48. Scott, *loc. cit. supra* note 15.

49. 117 Cal. App. 755, 4 P. (2d) 552 (1931).

50. Two years after the *Kuck* case a lower court stated that there had been no adoption of the tentative trust theory in California. Sherman v. Hibernia Savings & Loan Society, 129 Cal. App., Supp., 795, 20 P. (2d) 138 (1933). A still later case has considered the holding in the *Kuck* case to have approved the doctrine of the *Totten* case. Evinger v. MacDougall, 82 P. (2d) 194 (Dist. Ct. of Appeal, 1938).

51. There is no recognition in the *Kuck* case of the important element of a tentative trust that the mere deposit alone is sufficient to create the relationship.

52. Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370 (1898). In these joint account cases the relationship is so complete that the beneficiary could draw on the fund.

fundamental conflict between the beneficiary and the depositor's estate as to the former's right to the proceeds. In addition, any reference to theory is incidental or inferential, except the Minnesota case of *Coughlin v. Farmers and Mechanics Savings Bank.*[53] Consequently, these courts might not feel constrained by any such theory to reach undesirable results such as exemption from inheritance taxation or avoidance of the just claims of creditors, when the primary purpose has already been served, that is, when the beneficiary's right to the proceeds in the particular instance is assured.

The theoretical concept adopted by the lower courts in Pennsylvania is similar to the Minnesota view. In point of fact, these lower court cases are more decisive in resolving the conflict of theory. In each of three cases the court was confronted with a different problem, each requiring for its solution a determination of the exact moment of the creation of the trust. Each case cited the *Restatement.* In *Pozzuto's Estate*[54] the depositor's will revoked "all former wills, testaments, or writings in the nature thereof . . ." The court said: "There is nothing in the writing creating the trust in the case at bar that reasonably leads one to conclude that the decedent intended the trust to be testamentary in character . . . Here the deposit was 'in trust' and an immediate interest arose in the donee, subject only to revocation by some unequivocal act, and no . . . testamentary intent appears . . ."[55] In *Kardon v. Willing* the Federal District Court in Pennsylvania refused to allow the creator of an "in trust" account to set off the amount of it against his note to the closed bank, holding that "until . . . revoked either by the depositor or his creditors it (the tentative trust) remains in force and the beneficiary retains his beneficial interest therein."[56] The final situation, *In re Mines,*[57] concerned the liability of the tentative trust for inheritance taxes. The court held it was not subject to such taxation, saying: "The question involved really turns on whether any interest was created in the cestui que trust in the lifetime of the trustee. The last cited case (*Pozzuto's Estate*) is authority for the proposition that the very form of such deposit creates 'an immediate interest . . . in the donee . . .'"[58] It is perhaps significant, to those who look with disfavor upon such a view, that the Supreme Court of the state has not so declared. The extent of its utterances on the subject of the tentative trust consist of an express adoption of the rule in New York "where litigation of trust bank accounts has been much greater than with us".[59] The court may decide to go all the way with New York. It is possible, of course, that in the tax case the court was more concerned with maintaining the uniformity of Pennsylvania inheritance tax law than with applying the correct concept of the tentative trust. In holding the tentative trust not taxable, it adhered to the view of *In re Dolan's Estate,*[60] that the mere reservation of the power to revoke an ordinary trust does not make it a transfer taking effect at death and subject to an inheritance tax. As to the other two cases, there are lacking other reasons to justify their conclusions. They may have been mistaken as to the meaning of the *Restatement* section, but they certainly relied on it.

53. 199 Minn. 102, 272 N. W. 166 (1937).
54. 124 Pa. Super. 93, 188 Atl. 209 (1936).
55. *Id.* at 97, 99, 188 Atl. at 210, 211.
56. 20 F. Supp. 471, 473 (E. D. Pa. 1937), *aff'd,* C. C. A. 3d, Nov. 30, 1938, *cert. denied,* U. S. Sup. Ct., April 3, 1939.
57. 31 Pa. D. & C. 153 (1937).
58. *Id.* at 157.
59. Scanlon's Estate, 313 Pa. 424, 427, 169 Atl. 106, 108 (1933).
60. 279 Pa. 582, 124 Atl. 176 (1924).

This completes the resume of the cases and authorities which are at all reflective of a theory of tentative trusts. It appears the New York view cannot be that a trust is created at the moment of deposit, for then the subsequent decisions which have supplemented the doctrine, as in the case of creditors' claims, and beneficiaries predeceasing the depositor as defeating the "trust", etc., not only created additions to the rule but exceptions to the principle. The New York cases do not fit into such a preconceived notion. The *Totten* case is no longer the complete statement of the tentative trust rule in New York. Yet the "trust" theory can only be rationalized on that basis. Therefore, it would be more realistic to reject it in favor of the "testamentary" theory or adhere to none at all.

As has been indicated, all the cases which may be deemed contra may be rationalized or fairly disregarded by the highest courts of these states, except Minnesota, where a reversal would be required. If the superiority of the New York rule as herein established is conceded, it is lamentable that the *Restatement* did not definitely take such a position in unmistakable terms. The effect of the black-letter material in the other direction has not been very extensive, however. California reached its decisions without reference to the *Restatement,* and the latest Maryland case had recourse only to the comment to the section for its authority.[61] It is only in the Pennsylvania situation that a cursory reading of the black-letter section has proved misleading.

In the absence of legislation to handle the situation,[62] the great growth of savings bank accounts appears to assure a great future expansion of the doctrine to other jurisdictions and to justify an evaluation of the merits of the doctrine. In addition to a home, usually held in the names of both husband and wife as tenants by the entirety, the remaining worldly goods of the ordinary person which would be subject to distribution as part of his estate are the contents of savings accounts. The right of survivorship would pass the home and the tentative trust doctrine the cash balance of the normal estate without the necessity of making a will. The rights of creditors are protected when the tentative trust is used, and there would seem to be very little chance of any other fraud occurring of the type which led to the passage of the Statute of Wills with its formalities and requirements. There would appear to be no other interests that need protection and which might sustain a public policy refusing to recognize the tentative trust as a valid exception to the Statute of Wills.[63]

When a state does adopt the concept, the question then arises which theory most equitably disposes of claims against the deposit, keeping in mind at all time the intent of the depositor to get the proceeds to the beneficiary. On the pragmatic side the Pennsylvania cases have shown the kind of result to be derived from an application of the completed trust concept. The depositor thinks of the money as his own during his lifetime. Therefore, to apply to such a situation a doctrine which induces the idea of a mere legal title in him will be prone to produce other anomalous results such as the Pennsylvania cases.

These could have been avoided by treating the tentative trust as a testamentary disposition. Many other similar situations, it is felt, could also be avoided.[64] If it is desirable to have some theory upon which one

61. Bollack v. Bollack, 169 Md. 407, 182 Atl. 317 (1935). The case, however, did not involve any theoretical aspect.

62. Legislation is suggested as the ideal solution. Note (1934) 39 DICK. L. REV. 37, 41.

63. (1938) 86 U. OF PA. L. REV. 321; *id.* at 789, 790.

64. Matter of Weinberg, 162 Misc. 867, 868, 296 N. Y. Supp. 7, 10 (Surr. Ct. 1937).

might arrange the various incidents in orderly form, the "recognition of the savings trust in its true character as an alternative method of decedent devolution, which in certain aspects at least, is of essentially testamentary character" [65] would conceivably be the best.

W. H. R., Jr.

Local Assessments for Reconstruction and Repairs and Contractors' Guarantees

When as a result of a public improvement undertaken for the peculiar convenience of a certain locality, particular property in that locality has been benefited by an enhancement in value, the state may force that property to share in the cost of the improvement. Such are the simple facts of local assessment.

I. Local Assessment in General

It is not the purpose of this note to discuss in detail the nature of the legislative power to make local assessments or the theory behind them. However, in view of the scarcity of other materials on the subject, it does seem desirable to make a brief mention of fundamentals.

The courts from the moment that they are forced to determine the very nature of the power under which the state makes a local assessment are in disagreement. Some declare it an exercise of the police power,[1] others hold it derivative from the power of eminent domain,[2] and still others declare it to be only a special arm of the taxing power.[3] The great weight of authority and reason would seem to be with those courts which look upon the local assessment as primarily in the nature of a tax,[4] though peculiar in form and substance.

As to the theory on which the local assessment rests, it is plain. Where the state by a public improvement has specially benefited particular property, it is felt that the property should to a special extent bear the burden of the cost of the improvement. The assessment is merely an exaction from the property of compensation for the benefit.[5]

Also clear is the fact that the power to make an assessment resides solely in the state by virtue of its sovereign jurisdiction over taxation. The state may, however, delegate to the municipalities within its borders the authority to make local assessments. When it does, this authority is strictly construed and any deviation from it will cause the assessment to be void and incapable of placing a charge on the property assessed.[6]

II. Local Assessment for Reconstruction and Repairs

While the constitutionality of acts of the legislature or charters giving authority to municipal bodies to make local assessments for the construction of local improvements is unquestioned, the validity of acts or charters giving authority to assess for the reconstruction or repair of improvements

65. *Ibid.*

1. Reinken v. Fuehring, 130 Ind. 382, 30 N. E. 414 (1892); *cf.* Palmer v. Way, 6 Colo. 106 (1881), and Keese v. Denver, 10 Colo. 112, 15 Pac. 825 (1887).
2. Chicago v. Larned, 34 Ill. 203 (1864).
3. See *infra* note 4.
4. Burroughs, Taxation (1877) § 145; 5 McQuillin, Municipal Corporations (2d ed. 1928) § 2165 and cases therein cited.
5. Illinois Central R. R. v. Decatur, 147 U. S. 190 (1893); Bauman v. Ross, 167 U. S. 548 (1897).
6. Burroughs, Taxation (1877) § 148.

has not been universally recognized. First should be noted the distinction recognized by the courts between reconstruction and repair. In the words of one court [7] which had the issue fairly before it:

> "To 'repair' presupposes the existence of the thing to be repaired; . . . and, when we repair, we restore to a sound or good state, after decay, waste, injury, or partial destruction, the existing structure or thing which needs to be restored to its original condition. . . .
>
> "Reconstruction presupposes the nonexistence of the thing to be reconstructed, as an entity; . . . and 'reconstruction' is defined as follows: 'To construct again; to rebuild; to restore again as an entity the thing which was lost or destroyed' . . ." [8]

The courts of Pennsylvania have declared acts or charters authorizing assessment for either reconstruction or repair unconstitutional; and those of Illinois and Massachusetts have invalidated acts or charters authorizing assessment for repairs.[9] In other jurisdictions it would seem that the assessment for either reconstruction or repairs is unobjectionable.

The Pennsylvania Doctrine

The leading case in Pennsylvania on the constitutionality of acts or charters giving authority to assess for reconstruction or repairs is *Hammett v. Philadelphia.*[10] Here an Act of Assembly authorized the city of Philadelphia to "occupy Broad Street . . . and from curb to curb thereof . . . to improve the said street. . . ." The Select and Common Councils were authorized "to enact such ordinances or resolutions . . . as may require the cost of said improvements to be paid by the owners of the property abutting upon said street." The preamble of the act stated that the street thereafter in its improved state should be "for the uses and purposes of the public, and the benefits which will enure to them by making and forever maintaining Broad Street . . . the principal avenue of . . . the city." The city in pursuance of the Act passed an ordinance requiring the street, which had been paved with cobbles a few years previously, to be re-paved with a superior type of surface and providing for the assessment of abutting properties for the cost of the work. The Supreme Court of the state declared the act unconstitutional and the assessment void. Justice Sharswood in his opinion first admitted the power of the legislature to authorize municipal corporations to assess properties benefited by local improvements. He denied, however, the power of the legislature to authorize local assessment to meet the expenses of activities having as their primary object the convenience of the community at large, since by the exercise of such a power the entire cost of government could be placed upon the shoulders of one man. Thus, continued Justice Sharswood, where an improvement is made for the benefit of the general public and is of such a nature that provision for it becomes a duty devolving upon the general public, it cannot be paid for by forcing contribution from property in the vicinity. The repavement or repair of a street is an improvement of a purely general nature and one for which the community must provide out of general funds. Furthermore, local assessments are only

7. Fuchs v. City of Cedar Rapids, 158 Iowa 392, 139 N. W. 903 (1913).

8. *Id.* at 396-7, 139 N. W. at 904.

9. Because of a strong dictum in Ankeny v. Spokane, 92 Wash. 544, 557, 159 Pac. 806, 809 (1916), there is some reason to believe that perhaps Washington will fall among those states outlawing assessments for repairs.

10. 65 Pa. 146 (1870).

valid when special benefits have been conferred on property, and ". . . when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvement have been received." [11] Aware that the constitution of the state had no provision restricting the legislature in the exercise of its power to tax, Justice Sharswood declared that he did not care whether the assessment for general purposes and not in accordance with particular benefits conferred be called confiscation or the taking of private property without compensation; it is invalid as being violative of the property rights sought to be protected by the Declaration of Rights.

The importance of the *Hammett* case in relation to decisions in other jurisdictions lies in the judicial declarations that reconstruction and repairs are improvements general rather than local in character and that they cannot confer special benefits. Admittedly if either is so, the conclusion of invalidity for the assessment is correct. Yet the flat judicial determination of these propositions was evidently unsatisfactory, for time and again a hopeful legislature and various municipalities tested the court's persistence in its novel doctrine. And there were more than selfish reasons for so doing, for either of the apparent bases of the decision are easily refutable. First, it is perfectly conceivable that in a particular instance reconstruction or repairs of an improvement should be of special interest to a certain locality. At least, there is no reason why the construction of a street, for instance, should constitute a local improvement, and the subsequent betterment of the same street should be considered an improvement general in character. Justice Sharswood's apparent answer to this argument was that the distinction lies in the fact that it is the duty of the municipality to maintain streets as it is not to construct them. But this is no answer at all, only conclusion. Second, it is both unrealistic and untrue to say that reconstruction or repair cannot confer benefit on particular property. Both can, and do.

Thus it becomes difficult to believe that the language of the *Hammett* decision came solely as the result of legalistic reasoning. What, then, is a proper rationale of the decision? In the belief of the writer, it can be developed from two human factors: first, the conservative disposition of the Pennsylvania court in the face of a situation fraught with possibilities for interference with the right of private property, and second, the court's doubts as to the trustworthiness of municipal authorities in the use of the power to assess. Justice Sharswood emphasized the duty of the judiciary to protect the property of the individual, be he poor or wealthy, from the act of the "hydra-headed monster, a numerical majority, or that of the single aristocrat",[12] pointing out that by an unrestricted power of assessment the whole cost of government might be placed upon a few; and he envisioned assessment of property for improvements of a purely esthetic advantage to the public by a municipality more sensitive to the general public convenience than to the property interests of its individuals. He felt it imperative on the judiciary to call a halt to a doctrine, which, with a certain tone of displeasure, he admitted to be settled. That what the court was aiming at particularly was the protection of private property against unrestrained pursuit of the doctrine of local assessment, rather than a strict determination of whether either reconstruction or repair should rightfully come within the doctrine, seems clearer upon an inspection of the case of *Washington Avenue*,[13] decided only two years later.

11. *Id.* at 156.
12. *Id.* at 153.
13. 69 Pa. 352 (1871).

There Justice Agnew says of the *Hammett* case, in which he had concurred in the majority opinion:

> ". . . I consider it a fortunate circumstance that that case came up, for it led to an inquiry into the power of special taxation, which was in danger of running wild by insensitive degrees, and leading, before we had become aware of it, into the exercise of a bastard power to the right of private property, and violative of the provisions of the Bill of Rights, placed there for its protection. In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers without perceiving the progression, until the usurpations become so firmly fixed by precedents, it seems impossible to recede or break through them." [14]

This, without a single word in justification of the arbitrary decisions in the *Hammett* case that reconstruction and repairs could not be local improvements within the doctrine of local assessment or confer special benefits. Thus the Pennsylvania rule was launched.

For several reasons there was no real cause that the *Hammett* opinion should be decisive of the invalidity of local assessment for reconstruction and repair, even though the language there used was sufficiently clear. First of all there is one sentence in the little case of *Weber v. Reinhard,*[15] indicating that perhaps it was not the intention of the court which decided the *Hammett* case to outlaw every assessment for reconstruction or repair. In upholding a tax imposed on iron companies for the privilege of using township roads, the supreme court said of the *Hammett* case that "It did not question the constitutional right of the legislature to confer upon municipal corporations the power of taxing properties benefited by local improvements for the cost of making or *maintaining* them, but placed upon it the just and salutary restriction that it should be limited to the special benefits conferred by the improvements, and not extend beyond them; that the legislature could not authorize a tax to be levied on particular property in a designated locality for a general purpose, to which the whole community ought equally to contribute".[16] Added significance is given to this apparent denial that the *Hammett* case meant to prohibit any and every assessment for reconstruction or repairs by the fact that it was expressed by Justice. Sharswood. No subsequent court, if referred to *Weber v. Reinhard,* appears to have thought this sentence of any importance.

Further weight is added to the belief that the *Hammett* decision need not have definitely determined the question of the constitutionality of assessments for reconstruction and repair by the fact that if ever there was a case ideal for distinguishment, it was the *Hammett* case. Two elements were present in that situation which made it peculiarly unseemly that adjoining properties should be assessed for the repavement of Broad Street. First, the avowed purpose of the Act of Assembly was to make Broad Street the "principal avenue" of the city "for the uses and purposes of the public, and the benefit which [would] enure to them" therefrom. This language Justice Sharswood believed,[17] and it seems rightly, imported an undertaking primarily for the benefit of the general public. The second element making the case peculiar was that Broad Street had been paved

14. *Id.* at 364.
15. 73 Pa. 370 (1873).
16. *Id.* at 373 (ital. supplied).
17. Hammett v. Philadelphia, 65 Pa. 146, 157 (1870).

at the expense of the property owners only two years previous to the Act of Assembly authorizing the repavement and assessment. To this fact Justice Sharswood refers as indicative of the injustice of the assessment in question.

Yet only one case can be found which points to the fact that the peculiar circumstances of the *Hammett* case might have had something to do with the decision and that perhaps the language of the opinion should not be separated from the facts. In the case of *Michener v. Philadelphia,*[18] Justice Paxson had this to say of our leading case: "*Hammett v. The City* appears to have been misunderstood to some extent. At least it is frequently cited as covering a much broader view than its facts and the decision thereon warrant. [There] the owners of property on Broad Street were directed by an Act of Assembly to take up the pavement which they had paid for and lay down a new and expensive one, not for the benefit of their property but to provide a grand drive or boulevard for the public generally." [19] It is unfortunate for the true and historical doctrine of local assessment that the exact decision in the *Michener* case could not restrict the language of the *Hammett* case,[20] which has since been taken to outlaw assessment for every reconstruction or repair.

For the rest, the history of the doctrine of the *Hammett* case in the Pennsylvania courts, most of which have appeared more vigilant in the protection of private property than the court which founded the doctrine, is one of steady application and even, in some instances, extension. Even before the *Michener* case it was held that certainly there could be no assessment for maintenance and repair; [21] and one year after the *Michener* decision the doctrine that there could be no assessment for repairs was reaffirmed,[22] never again to be doubted in the state. Only one of Justice Sharswood's statements in the *Hammett* case has ever been disavowed, and this neither intentionally nor expressly. In the case of *Morewood Avenue,*[23] the court explains that the fundamental idea of the *Hammett* case was that "Local assessments could only be made for improvements which conferred peculiar local benefits upon property which adjoined the improvement, and *even then* it could not be made after the property had once been subjected to assessment." [24] It will be recalled that Justice Sharswood declared that after the improvement had been once constructed no special benefit *could* later be conferred upon property adjoining.

Only a few of the applications of the doctrine of the *Hammett* case require special mentioning. It would seem that the important element in precluding the assessment is not, as the language of the *Morewood* case would imply, that the property has been once assessed for repairs, but rather that the improvement has once been made, whether at the expense of the adjoining property or of the municipality.[25] But the fact that the property owner has built at his own expense a sewer for private use will not preclude assessment by the municipality for a subsequently constructed public sewer.[26] Where a sewer has once been constructed, there may be

18. 118 Pa. 535, 12 Atl. 174 (1888).

19. *Id.* at 539, 12 Atl. at 175.

20. No question of reconstruction or repair was present in the *Michener* case, the assessment there being for the original construction of a sewer.

21. Appeal of the Protestant Orphans Asylum, 111 Pa. 135, 3 Atl. 217 (1886).

22. Williamsport v. Beck, 128 Pa. 20, 28 Atl. 123 (1893).

23. 159 Pa. 20, 28 Atl. 123 (1893).

24. *Id.* at 28, 18 Atl. at 126 (ital. supplied).

25. Williamsport v. Beck, 128 Pa. 147, 18 Atl. 329 (1889); Harrisburg v. Segelbaum, 151 Pa. 172, 24 Atl. 1070 (1892).

26. Philadelphia v. Odd Fellows, 168 Pa. 105, 31 Atl. 917 (1895).

no subsequent assessment for reconstruction.[27] Where all but the middle portion of a street has been paved previously and the cost defrayed by local assessment, an assessment for the subsequent pavement of the middle portion will be valid, since, according to the rule of the *Hammett* case, no benefit has yet been received from any improvement to that part of the street.[28] And finally, the *Hammett* rule does not apply to repairs to sidewalks, since in every case in which a sidewalk is bettered special benefit is conferred upon the property owner.[29]

The Rule in Illinois and Massachusetts

No other state has gone so far as Pennsylvania in invalidating assessments, the rule in all other jurisdictions being that assessments for the reconstruction of local improvements is a constitutional exercise of the taxing power. But Illinois and Massachusetts have declared statutes authorizing assessments for repairs unconstitutional.

The roots of the Illinois restriction on the power to authorize local assessments can be traced to *Hammett v. Philadelphia* from which in *Crane v. West Chicago Park Commrs.*[30] the Illinois court quoted to show that repairs cannot confer a special benefit, and to the doctrine, peculiar to that state, that in order for a particular work to be a local improvement it must be permanent in nature.[31] The Illinois court classified repairing with street cleaning and sprinkling among those improvements which, because of their "evanescent" nature, cannot be classified as local improvements within the principles upon which all assessments rest.

The Massachusetts determination in the case of *Sears v. Street Commrs.*[32] that there can be no constitutional assessment for repairs rests on the sole ground that repairs can confer no special benefit on property adjoining, and derives its authority from the Pennsylvania cases stemming from *Hammett v. Philadelphia.*

Unlike Pennsylvania and Illinois, Massachusetts has not been notably consistent in its doctrine that the assessment for repairs is unconstitutional. In the *Sears* case a board of street commissioners was authorized by statute to assess property for the construction, maintenance and operation of sewers. Sewer charges were levied on property owners not only for general construction but also for maintenance and operation. The basis of computation was the value of the land assessed. As we have mentioned, the Supreme Judicial Court in unanimously declaring the statute unconstitutional, expressed the belief that an assessment for maintenance could not of necessity be based on special benefits. Just a year later, there came before this same court the case of *Carson v. Brockton,*[33] involving a statute authorizing city councils to establish rental charges or rents for the use of sewers. In pursuance of this authority, the city council of Brockton made charges on the basis of the number of gallons of sewage delivered to the

27. Erie v. Russell, 148 Pa. 484, 23 Atl. 1102 (1892). It is worthy of note that Justice Sharswood in the *Hammett* case speaks always in terms of repairs. But what was actually decided in that case was that an assessment for reconstruction (repavement) was unconstitutional. The courts which followed, while observing the language of the opinion, did not ignore the decision, and declared assessments for reconstruction and repairs invalid indiscriminately.

28. Alcorn v. Philadelphia, 112 Pa. 494, 4 Atl. 185 (1886).

29. Smith v. Kingston Borough, 120 Pa. 357, 14 Atl. 170 (1888).

30. 153 Ill. 348, 38 N. E. 943 (1894).

31. Chicago v. Blair, 149 Ill. 310, 36 N. E. 829 (1894); Waukegan v. DeWolf, 258 Ill. 374, 101 N. E. 532 (1913); Rienzi v. Lincoln Park, 198 Ill. App. 218 (1916).

32. 173 Mass. 350, 53 N. E. 876 (1899).

33. 175 Mass. 242, 56 N. E. 1 (1900).

sewers. The statute was upheld by a unanimous court, Chief Justice Holmes in his opinion stating:

> "We are of opinion that the petitioner received a special benefit for which he might be charged, and that this case is free from the elements which in *Sears v. Street Commrs.* led to the conclusion that the petitioner was assessed without regard to the benefits received by him. No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. . . . If building a sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it." [34]

Chief Justice Holmes goes on to say that the charge here, unlike that of the *Sears* case, was definitely based on benefits, since it was levied according to *use,* "which is a reasonable way of estimating the benefits conferred." [35]

It is not easy to reconcile this holding with the statement of the *Sears* case that "Where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers. . . ." The Supreme Court of the United States, when the case came before it, admitted that it could not readily perceive a distinction between the cases.[36]

Two years after the *Carson* case still another sewer assessment act was attacked before the Massachusetts court on the grounds that it authorized assessment for repairs.[37] In upholding the act, Chief Justice Holmes remarked:

> "It is suggested that the language of the act extends to expenditure for maintaining the sewer and is bad on that ground. We do not understand it to have that meaning. Therefore it is unnecessary to discuss *Carson v. Brockton* . . . and *Sears v. Street Commrs.* . . . which seem to have appeared to the Supreme Court of the United States to be less reconcilable than we had supposed." [38]

It is properly inferable from these cases that Massachusetts would still declare an assessment clearly for repairs only, and not levied according to use as in the *Carson* case, a deprivation of property without due process. It is clear, however, that in Massachusetts an assessment for reconstruction is valid.[39]

III. Contractors' Guarantees

While in jurisdictions other than Pennsylvania, Illinois, and Massachusetts there is no constitutional restriction on the power to authorize assessments for the repair of local improvements, such authorization is seldom given. The reasons for this are in the main the same as the objec-

34. *Id.* at 243-4, 56 N. E. at 1.
35. *Id.* at 244, 56 N. E. at 1.
36. Carson v. Brockton Sewerage Comm., 182 U. S. 398 (1900).
37. Smith v. City of Worcester, 182 Mass. 232, 65 N. E. 40 (1902).
38. *Id.* at 236, 65 N. W. at 42.
39. Sayles v. Board of Public Works of Pittsfield, 222 Mass. 93, 109 N. E. 823 (1915). In Union Street Ry. v. New Bedford, 253 Mass. 304, 149 N. E. 42 (1925), an assessment was made to pay for the widening of a street. The court upheld the assessment, using throughout the word "betterment" to describe the improvement. In this case the benefits to the land assessed had been used as the basis of the assessment. See also Crofts v. Benoit, 261 Mass. 191, 158 N. E. 561 (1927).

tions to assessments for such a purpose voiced by Justice Sharswood in the *Hammett* case. First, it is felt that the repair of improvements is a duty which should fall on the public in most instances, even though it may and frequently does peculiarly benefit local owners. Second, there is always the danger of the discrimination and fraud of which Justice Sharswood was so wary, where local officers are vested with such wide powers of assessment.[40] The legislatures, probably wisely, have not been disposed to ignore the great possibility of tie-ups between politicians and contractors. Perhaps a third reason why authority to assess for repairs is not more often given is the administrative problem which would be created if in every case where repairs are needed the property adjoining should be assessed. It would be entirely possible that, in most cases, the costs of laying out an assessment district and otherwise effectuating the levy would devour the amount which could constitutionally be assessed against adjoining property.

A great body of litigation has grown up as a result of the diligence of local authorities in getting contractors' guarantees on work which has been awarded where, in the particular jurisdiction, an assessment for repairs is unconstitutional, or, if constitutional, has not been authorized by act or charter. The classic objection to these guarantees has been that they have the effect of charging upon properties which are liable to assessment for the construction only of the improvement, the additional burden of repairs, contrary to fundamental law, or the act or charter pertinent. The classic resolution of the problem thus presented to the courts has been by the determination of whether the particular guarantee is of the quality of the workmanship and materials put into the original construction or whether it really amounts to an undertaking by the contractor to keep the improvement in repair whatever the nature of the defects which may subsequently appear. If the guarantee appears to be of the former kind, it will be declared valid as imposing no burden on the contractor, and hence on the property assessed, that he or it would not otherwise have to assume, and as being, in truth, a protection to the property against slovenly construction and resultant later assessments. If the guarantee is of the latter type it is illegal, its effect being to charge the property with a burden which it cannot be required to assume.[41]

There has been little uniformity in the language or requirements of the guarantees which have come before the courts, and consequently no more uniformity of decision. Each of the cases has been decided more or less on its own facts. Yet, we find the courts applying certain tests to the guarantees as aids in placing them in one or the other of the two categories. Few courts in a particular case will use only one of the traditional tests, and similarly few will use all. But if one test is omitted in one case it will recur in the next, so that all are of fairly common coinage. It is the purpose of the writer in the remaining portion of this note, to mention the more important of these tests and outline their workings.

The Wording of the Guarantee

Invariably where the guarantee is to make repairs which shall be deemed necessary "because of imperfections in said work, or materials used",[42] or that "the work done under this contract, and the materials used

40. See the opinions of Kansas City v. Hanson, 8 Kan. App. 290, 55 Pac. 513 (1898), *rev'd*, 60 Kan. 833, 58 Pac. 474 (1899) and Williamsport v. Beck, 128 Pa. 147, 18 Atl. 329 (1889).

41. 5 McQUILLIN, MUNICIPAL CORPORATIONS § 2179.

42. Hodges v. Roswell, 31 N. M. 388, 347 Pac. 310 (1926).

in the construction of the same are free from defects or flaws",[43] or where by any other language it is made clear that the municipality is bargaining for no more than an assurance that the work will be well done,[44] the ordinance or contract of which the guarantee is a part will be upheld. However, since the tendency of the courts has been to uphold contracts containing guarantees because of their belief that the public needs protection against dishonest contractors, it is not equally clear, where the language of guarantee imports an obligation to repair all defects which might arise, that the assessment will be invalidated. Thus where the contractor covenanted ". . . that [he] will do all work required in such good and substantial manner that no repairs will be needed",[45] he has been held to have guaranteed his workmanship only. The same result has been reached where the guarantee stipulated that the work shall be and remain at the end of the guarantee period in as good condition as when turned over to the city.[46] However, in the ordinary case where there is nothing whatsoever to show that the guarantee is of workmanship or materials, and the obligation to repair is absolute, the court will invalidate the contract and assessment, unless by one of the other tests it can manage to uphold it.[47] Especially interesting are those cases in which in one part of the contract the guarantee appears to cover all repairs and in another seems to concern defects arising from defective workmanship and materials only. In these cases, the courts' tendency to favor the contracts manifests itself in an emphasis on the stipulations indicating a guarantee of fitness only and in the declaration by the courts that it is these stipulations which truly define the intent of the parties.[48]

The Burden Cast Upon the Property

If the act of the legislature or the municipal charter gives authority to assess for the construction of an improvement but not for repairs to it, the liability of property adjoining should be limited to the costs of construction. Thus the fundamental objection to contractors' guarantees is that they throw upon property a burden not authorized by the legislature. So it is that the courts, in determining whether a contract containing a guarantee is valid or not, often look to the practical effect of the guarantee upon the contract price. Where the guarantee places upon the contractor the obligation to repair all defects, the argument is made that the contractor would not undertake such an obligation without raising his bid for the work, although it is expressly stated in the ordinance under which the contract is let that the burden of repairs shall be entirely upon him.[49] While realistic, this argument would, it is submitted, cause an invalidation of every contract of guarantee; for it is certain that no contractor is going to bid as low in a case where a guarantee must be given as where not, no matter how clear it is that he will be required to repair defects due only to poor work, and no matter how great his confidence in his ability to do a perfect job.

43. Louisville v. Mehler, 108 Ky. 436, 56 S. W. 712 (1900).

44. New Haven v. Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517 (1906); Osburn v. Lyons, 104 Iowa 160, 73 N. W. 442 (1898); Robertson v. Omaha, 55 Neb. 718, 76 N. W. 442 (1898); Lawrence v. Portland, 85 Ore. 586, 167 Pac. 587 (1917).

45. Schenectady v. Union College, 66 Hun 179, 21 N. Y. Supp. 147 (Sup. Ct. 1892).

46. Hedge v. Des Moines, 141 Iowa 4, 119 N. W. 276 (1909).

47. Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125 (1898); Bullitt v. Selvage, 20 Ky. L. R. 599, 47 S. W. 255 (1898); Boyd v. Milwaukee, 92 Wis. 456, 66 N. W. 603 (1896).

48. Wheeler v. Dist. Court, 80 Minn. 293, 83 N. W. 183 (1900).

49. Brown v. Jenks, 98 Cal. 10, 32 Pac. 701 (1893); People v. Maher, 56 Hun 81, 9 N. Y. Supp. 94 (Sup. Ct. 1890).

At least one case [50] declares that when, as security for the performance of the guarantee, bonds are required to be posted by the contractor, the contract should be invalid, since the necessity of drawing assets from his business would inevitably cause the contractor to raise the amount of his bid for the construction. This argument, also, would cause the invalidation of almost every contract containing a guarantee, since in practically every instance some security entailing extra expenditure on the part of the contractor is required.

In some cases a finding by the court that no added burden has been imposed on the contractor has prevented the assessment from being invalid even where the guarantee contains words indicating an obligation to make all repairs. In Pennsylvania, if the court can find that the guarantee is such that no burden is placed on the contractor beyond that which he would assume if no guarantee were required, the assessment will be upheld.[51] This test requires an inspection by the court into the nature of the improvement and the length of time which, if properly constructed, it should last without repairs. A New York case upheld an assessment for construction done under a guarantee calling for general repairs to be made by the contractor, where it was shown that the bid for this job was the same as that for identical work done under a contract containing no guarantee.[52]

An interesting problem arises where, under statutes giving authority to assess for the repair of existing defects, a guarantee of repairs generally has been required of the contractor. Here the courts have taken the view that an unauthorized burden has been placed upon the property assessed since by the statute it can be assessed only for repairs which have once become necessary, whereas by the guarantee it is made to bear the burden of anticipated repairs which may never come into actual being and for which there may never be liability.[53]

The Length of Time Covered by the Guarantee

Where the guarantee for repairs, although absolute, is for a short period only, the chances are that it will be upheld as a guarantee of workmanship only.[54] One court has upheld a contract containing an eight year guarantee, on the grounds that the period of guarantee was no longer than the ordinary durability of the pavement when laid with the best workmanship.[55]

The more recent decisions have shown a definite tendency to validate the contract where possible, and a disposition on the part of the courts to allow greater discretion on the part of municipal authorities in their dealings with contractors.[56]

SUMMARY

The power of the legislature to assess or authorize assessment for the original construction of a local improvement is nowhere questioned. In

50. Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125 (1898).

51. Philadelphia v. Pemberton, 208 Pa. 214, 57 Atl. 516 (1904). See also Martin v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807 (1906).

52. Siegfried Construction Co. v. New York, 126 Misc. 689, 214 N. Y. Supp. 385 (Sup. Ct. 1926).

53. Brown v. Jenks, 98 Cal. 10, 32 Pac. 701 (1893); Portland v. Bituminous Paving Co., 33 Ore. 307, 52 Pac. 28 (1898).

54. Pease v. Payette, 26 Idaho 793, 147 Pac. 290 (1915); Covington v. Dressment, 6 Bush. 210 (Ky. 1869); Louisville v. Henderson, 5 Bush. 515 (Ky. 1869).

55. People *ex rel.* North v. Featherstoneaugh, 172 N. Y. 112, 64 N. E. 802 (1902).

56. Hodges v. Roswell, 31 N. M. 384, 247 Pac. 310 (1926); Siegfried Construction Co. v. New York, 126 Misc. 689, 214 N. Y. Supp. 385 (Sup. Ct. 1926).

Pennsylvania alone, however, there may be no assessment for work of any kind done in betterment of an improvement after it has been once constructed. An uncertain number of jurisdictions, but certainly Illinois and Massachusetts, deny the constitutionality of an assessment for repairs to an improvement. However, even where the power to assess for repairs is not contrary to fundamental law, it is seldom exerted. But in many instances, somewhat the same effect as an assessment for repairs has been obtained through the requirement of contractors' guarantees of the original construction. The courts have tended to uphold these guarantees, thus placing their desire to protect the public against dishonest contractors above the possibility that an illegal burden has been placed on property by the assessment.

T. O. R.